S. HRG. 100-345

NOMINATION OF FRANK Q. NEBEKER

HEARING

BEFORE THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

ON

NOMINATION OF FRANK Q. NEBEKER TO BE DIRECTOR OF THE OFFICE OF GOVERNMENT ETHICS

OCTOBER 29, 1987

Printed for the use of the Committee on Governmental Affairs

U.S. GOVERNMENT PRINTING OFFICE

79-618 WASHINGTON : 1988

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

S401-14

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NOMINATION OF FRANK Q. NEBEKER

THURSDAY, OCTOBER 29, 1987

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 9:45 a.m., in room SD-342, Dirksen Senate Office Building, Hon. Carl Levin presiding.

Present: Senators Levin and Cohen.

OPENING STATEMENT OF SENATOR LEVIN

Senator LEVIN. Good morning everybody. This hearing has been called to consider the nomination of Judge Frank Q. Nebeker, retired Associate Judge of the District of Columbia Court of Appeals, to serve a 5-year term as prescribed by law as Director of the Office of Government Ethics, or OGE.

OGE was established in 1978 under Title IV of the Ethics in Government Act and was, as to the Executive Branch, empowered to enforce ethics statutes and standards of conduct, review financial disclosure statements and agency ethics systems, develop and evaluate ethics statutes and regulations, and promote the understanding of Federal ethics rules.

The position of Director of OGE is extremely important, as the Director must, in the words of the Ethics in Government Act, provide "overall direction of Executive Branch policies related to preventing conflicts of interests."

From the time the office was created in 1978, some 9 years ago, OGE has had five directors or acting directors and what can perhaps most charitably be described as an uneven history of ethics leadership and enforcement. Some of OGE's actions have shown that the office can provide the kind of direction to Executive Branch employees contemplated by the Ethics Act.

For example, OGE is generally prompt and effective in rendering legal advice when asked and providing ethics training to Executive Branch employees. However, all too often OGE has only been reactive, waiting for an event to occur or a request to be made of it in an ethics matter rather than taking the initiative to identify important issues and possible solutions prospectively.

For example, OGE has failed to establish basic information gathering systems and procedures to monitor developments in the Executive Branch relative to ethics issues. As a result, OGE has failed to perform its statutory responsibility to monitor Federal ethics programs. Moreover, OGE has been remiss in not taking advantage of the opportunity to establish common approaches to ethics issues on a government-wide basis through the issuance of regulations.

For example, OGE has not issued sufficient formal advisory opinions to clarify existing statutes. Finally, OGE has often been reluctant to take a position on whether it believes an actual violation of the standards of conduct has occurred in particular cases.

Over the past 9 years it has become apparent that the effectiveness of the Federal ethics program is clearly influenced by the individuals who serve as ethics officials. Nowhere is that more true than with regard to the position of OGE Director. OGE needs a tiger in its tank—a fair tiger, of course. The Director is an important figure in establishing the ethical climate in the Executive Branch. Of course, the White House attitude and conduct is even more important. But the OGE Director can send the signal to Executive Branch employees that marginal conduct will not be tolerated; that infractions will not be excused and will be punished; that avoiding the appearance of a conflict-of-interest is mandatory and not merely "aspirational."

Now, that is probably the most critical aspect of the Director's job—setting the tone, letting the Executive Branch employees know where the line will be drawn on questionable ethical conduct. By his or her actions and public statements, the Director can give clarity and emphasis to what are often confusing and ignored statutory prescriptions.

Unfortunately, the opposite is equally true. Statements and actions which run contrary to the goal of strong ethics enforcement can have a devastating effect on the public's perceptions of the Federal service and Federal officials' understanding of their ethics responsibilities. Legal requirements that current and former Government employees conduct themselves in an ethical manner are almost meaningless unless emphasized by those responsible for their administration.

It is also important that the OGE Director be a good administrator, able not only to coordinate the work of the employees directly in the OGE, but also to oversee and integrate the work of the more than 100 agency DAEOs and also of the Inspectors General, who play an important role in investigating conflict-of-interest allegations.

Finally, I would be remiss not to point out how necessary it is to have an OGE Director with a tough skin, coolness under pressure, and a willingness and ability to stand up to superiors, if necessary.

When confronted by evidence that a conflict of interest has occurred, the OGE Director must ensure that the statutes, the standards of conduct, and existing regulations are enforced. This will not always be easy, for he or she must frequently be prepared to challenge the actions of high-ranking Federal officials. Thus, the person selected to head the Office of Government Ethics must possess a high degree of independence and a willingness to utilize the resources and support available to OGE in the administration of Federal ethics standards.

Judge Nebeker has an unusual background which he would bring to this office. While he has limited experience in Executive Branch ethics law or procedures, he has served for the past 18 years as an Associate Judge on the District of Columbia Court of Appeals. For 11 years before that he was an Assistant United States Attorney in the Department of Justice.

He has indicated he intends to apply for senior judge status, which will permit him to hear cases on a limited basis after his departure from OGE. He would not, however, be permitted to hear cases while serving as OGE Director.

Your fine reputation has preceded you, Judge. We welcome you here to your confirmation hearing, and before I ask Senator Cohen for his opening remarks, let me say that Senator Warner was expected to be here and I know will be here. We had hoped to delay this long enough so that he could introduce you. If you are in the middle of your testimony when he comes in, we will just interrupt so that he can do what I know he looked forward to doing, which is to say some glowing things about you.

Senator Cohen?

OPENING STATEMENT OF SENATOR COHEN

Senator COHEN. Thank you, Mr. Chairman. Judge Nebeker, as I listened to my good friend and colleague describe the obligations and duties and challenges of the office to which you are now nominated to direct, I thought that he is requiring a combination of the talents of Clark Kent, Arnold Schwarzenegger, as well as a tiger in the tank. [Laughter.]

But Senator Levin is correct in outlining the responsibilities of this office. There are some 15 statutory duties or obligations and it does require a person of your intelligence, integrity and background. And one of the most important responsibilities, I suppose, is being the bearer of bad news to people who come into Government service, when you suddenly have to advise him or her that they have to sell certain stocks to remove a potential conflict of interest in terms of their position and their individual holdings.

As Senator Levin has at least alluded to, we have had some difficulties in the past when the office itself was not regarded very highly, and was regarded as having little clout or enforcement capacity. As we can see from current events, there can be very serious charges that are leveled against people who have served in the White House and then go out into the private sector. I think that it is really going to require someone who has the requisite intelligence, integrity and dedication to making those tough decisions.

Also, I think we have to be careful that the advisor not amount to a sort of "ethics czar"—some unaccountable ethics czar—because we know that reputations can be sullied rather easily in this town. It only takes a superficial charge that is suddenly in the newspaper, and someone is damaged irreparably for their lifetime. So it takes a delicate balance of someone being tough enough, but also someone who is very sensitive. I think that your judicial experience really does qualify you to make those kinds of sensitive but tough decisions.

I have not had the opportunity to meet with you personally, but I know my staff has been very impressed with not only the way in which you have answered questions, but with your background as well. And so I think that you will really do an outstanding job in this position and I welcome your testimony this morning.

[Senator Cohen's prepared statement follows:]

PREPARED STATEMENT OF SENATOR COHEN

I am very pleased that the Governmental Affairs Committee is considering today the nomination of Judge Frank Q. Nebeker to be the new Director of the Office of Government Ethics. Since 1981, Senator Levin and I have been involved in several efforts to improve the ethics program governing the Executive Branch. Key to the successful administration of the ethics laws is, of course, the Office of Government Ethics, a small office which is charged with the large statutory mandate to oversee and coordinate the ethics program of the entire Executive Branch.

The Director of the OGE holds a very sensitive position indeed. The Ethics in Government Act requires the Director to provide "overall direction of executive policies related to preventing conflicts of interest on the part of officers and employees of any executive agency." His 15 statutory responsibilities require him to assume many roles: advisor to agency personnel, an interpreter of the ethics laws and regulations, and an enforcer and adjudicator when there has been a violation of ethics laws or standards. The Director of the OGE can provide a very great service to government officials by advising them on how to avoid conflict-of-interest problems, but he can also be, at times, the bearer of bad news, such as when he must inform a top-level official that he or she must divest certain holdings, or recuse himself or herself from a particular matter due to a conflict of interest. The Director of the OGE must be able to perform all of these roles and be willing to withstand the political pressure that may result when he rules on the conduct of high-ranking officials.

While it is crucial that the Director of the OGE be independent when faced with such pressure, the Director must also take care not to become an unaccountable "ethics czar". Reputations can be sullied irreparably if judgments on ethical behavior are made too hastily, and careers of dedicated public servants can be permanently damaged. It is especially important, then, that the individual who serves as Director of the OGE be an individual of integrity, intelligence, and professionalism.

From what I have learned to date about Judge Nebeker leads me to conclude that he possesses all of these qualities. His many years on the D.C. Court of Appeals and his professional background make him eminently qualified to serve as the Director of the Office of Government Ethics. I believe that he will provide the leadership to this Office which is crucial to making the OGE effective in interpreting and enforcing standards of conduct for Executive Branch officials.

I am particularly pleased that the Administration acted swiftly in nominating a new Director for his important office. With the authorization of the OGE expiring in October of next year, it is important that a new Director be in place in order to aid this Committee review, and possibly revise, the structure of the Office of Government Ethics.

The OGE has had a very stormy history over the past few years and is, unfortunately, generally perceived as a weak office. I am hopeful that Judge Nebeker will infuse new vitality into this Office and provide strong leadership to the entire ethics program in the Executive Branch.

Senator LEVIN. Judge Nebeker, would you come forward. Do you swear to testify this morning to the truth, the whole truth and nothing but the truth, so help you God?

Judge NEBEKER. I do.

Senator LEVIN. Do you have any opening comment or statement?

TESTIMONY OF FRANK Q. NEBEKER, ASSOCIATE JUDGE OF THE DISTRICT OF COLUMBIA COURT OF APPEALS [RETIRED], NOMINEE TO BE DIRECTOR OF THE OFFICE OF GOVERNMENT ETHICS

Judge NEBEKER. Suffice it to say, Mr. Chairman, thank you for your kind comments, and Senator Cohen, for your kind comments.

I am proud to be the President's nominee for this position. I am grateful to him. And I hear both of you loud and clear. I do not know that I will be a true tiger. It depends on whether I have teeth. We will find that out.

Senator LEVIN. Being a good Detroiter, as I am, and having rooted for the Tigers all year, there was a double meaning to "tiger in your tank." I want to assure you of that.

Judge NEBEKER. I did not think that would escape you, sir.

Senator LEVIN. First of all, if you are accompanied by any family members this morning, perhaps you might take this time to introduce them to us.

Judge NEBEKER. Thank you, Mr. Chairman. Yes. I would like to introduce my wife, Lou Nebeker, and my son, Mark Nebeker. He is an Assistant United States Attorney following in John Warner's footsteps and following in my footsteps in the same office.

Senator LEVIN. We welcome your family.

Judge NEBEKER. My secretary, Marlene Davis, is also present. And Judge Stan Harris of the United States District Court, a former colleague of mine.

Senator LEVIN. You can't make any mistakes this morning, then.

Here is Senator Warner as we expected, so we are going to pause for a moment. He is not moving quite as rapidly as he used to.

John, we knew you were coming and——

Senator COHEN. Delayed as long as possible.

Senator LEVIN. Yes, we held off here.

TESTIMONY OF HON. JOHN W. WARNER, U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator WARNER. Mr. Chairman and my distinguished friend, the Senator from Maine, I am sorry to be a few minutes late. I had to give a few words elsewhere this morning. I presume you are mid-way through this?

Senator LEVIN. We are just beginning his testimony. We did indicate that we knew that you wanted very much to be here to introduce him and that we would interrupt at any moment you got here.

Senator WARNER. The Chair is very gracious and I thank the Chair and members of the Committee.

I would like to put my statement in the record as if read in full and just say that it is a great personal privilege for me to be a small part of this proceeding which will hopefully lead to the confirmation by the whole of the United States Senate.

I have known this gentleman more years than we would like to recall, having started together in the U.S. Attorneys Office here in Washington, D.C. And as the Committee knows, he then went on to serve for 18 years on the Bench and now he has determined that he will put as the capstone on his career a tour of duty with the Executive Branch.

He does bring to this position the background of integrity that it requires, and I give my unreserved support for this nominee and wish him well. And hopefully my name shall not appear before your Committee in any way. [Laughter.]

Senator LEVIN. And if it does, we are sure he will disqualify himself. [Laughter.]

[Senator Warner's prepared statement follows:]

PREPARED STATEMENT OF SENATOR WARNER

Mr. Chairman, it is my extreme pleasure to come before the Committee this morning to introduce the President's nominee to be Director of the Office of Government Ethics of the Office of Personnel Management.

I have known Judge Frank Nebeker for some three decades, and at any time during our acquaintance I would have given Judge Nebeker my unqualified endorsement. I am pleased to have that opportunity today.

I know that the Committee will also extend its welcome to Frank's wife, Louana, and his son, Mark, who are with him today. I would note for the committee that Mark currently serves his country in his father's footsteps, as an Assistant U.S. Attorney in the District of Columbia.

During Judge Nebeker's years at that same office, I came to know a man of great integrity and skill. I had been at the U.S. Attorney's office for about a year when Frank Nebeker joined that office, and though he will tell you that John Warner held his hand during his first felony trial, let me tell the committee that that would be a nice story if it were true: Judge Nebeker acquitted himself then as he does now—skillfully, honorably and admirably.

Over the years of our friendship, I have always found Judge Nebeker to be independent-minded—a quality which the nominee to this post should possess.

As Judge Nebeker retires from his post of the past 18 years, he brings before the committee an impressive record of achievement.

Let me simply say that I am pleased to represent Frank Nebeker in the U.S. Senate, and I am delighted to introduce Judge Nebeker to this committee with my strong endorsement.

Senator LEVIN. Senator Warner last night was the recipient of the Mendel Rivers Award so he is blushing a little bit this morning. Most of your friends got there, I know, last night but some of them did not, including this one. But we wanted to add our congratulations to you, and your being here this morning adds some additional lustre to Judge Nebeker.

Senator WARNER. I thank the Chair. I thank my good friend. Good luck.

Senator LEVIN. Judge, we all know you served as an Associate Judge on the Court of Appeals for the District of Columbia until your retirement. You now serve as a retired Judge on that Court and you have applied for senior judge status to permit you to hear cases after retirement.

Can you, for the record, explain the difference between a retired and a senior judge and relate your expectations for returning to the Court?

Judge NEBEKER. Yes, sir. When a judge reaches eligibility for retirement and announces the effective date of his retirement, by statute he reverts to retired status for so long as the office that he held remains vacant. When a successor is appointed—which should be within probably the next, well nominated at least within the next few weeks—when that individual is qualified and takes his oath of office, a retired judge has 120 days in which to apply to the District of Columbia Commission on Judicial Disability and Tenure for a recommendation to serve as a then senior judge.

When that recommendation is forthcoming, the judge may then sit at the pleasure of the chief judge of the respective court—in this case it would be Chief Judge Pryor, assuming he is chief judge when I seek to return to judicial duties—and at that juncture I would be known as a senior judge. The retired status is simply an interim status. The judicial powers and responsibilities remain the same.

Senator LEVIN. Will you be receiving any compensation from your service as a judge while you are serving as the OGE Director?

Judge NEBEKER. Not for services as a judge. I will be receiving a retirement annuity.

Senator LEVIN. What amount is that? Was that disclosed on the form?

Judge NEBEKER. Yes. It is disclosed on the record.

Senator LEVIN. That is fine.

Judge NEBEKER. I have forgotten the exact figure.

Senator LEVIN. I am sure your family has not, but—[Laughter.]

Do you know of any reason, personal or otherwise, that would in any way prevent you from fully and honorably discharging the responsibilities of the Director of Office of Government Ethics?

Judge NEBEKER. I know of none, sir.

Senator LEVIN. Is there anything that you are aware of in your background which might present a conflict of interest with the duties of your office?

Judge NEBEKER. None, sir.

Senator LEVIN. Were there any conditions expressed or implied attached to your nomination?

Judge NEBEKER. None other than that I have to work.

Senator LEVIN. Were you asked about your political involvement or political persuasion?

Judge NEBEKER. I was not.

Senator LEVIN. Were you asked which political party you were affiliated with or prefer, if any?

Judge NEBEKER. I was not.

Senator LEVIN. Were you asked about any matter before the Office of Government Ethics?

Judge NEBEKER. I was asked, respecting the newspaper reports, whether I was aware of them with respect to a report that the then Director had made to Congressman Sikorski. But it was just the question, had I read about it in the newspaper, and indeed I had.

Senator LEVIN. Other than that, were you asked about any matter before the OGE?

Judge NEBEKER. No.

Senator LEVIN. The OGE resides organizationally within the Office of Personnel Management, with the Director appointed by the President to a 5-year term of office. The position is particularly sensitive in that the Director may be called upon to criticize the actions of the head of OPM, close confidants or friends of the President, or even the President himself.

Because the Director serves at the pleasure of the President he or she may be removed at any time. Do you believe that the Director of OGE is sufficiently insulated from influence to permit him or her to carry out his or her responsibility?

Judge NEBEKER. I do so as far as I am concerned, yes.

Senator LEVIN. Do you believe that there should be some additional protection by statute for the OGE Director?

Judge NEBEKER. I lack sufficient experience to answer that question at this point.

Senator LEVIN. Would you, after a year or so in office, mark your calendar to let us know what recommendations you might have in that regard, if any?

Judge NEBEKER. I will do so. I also understand that reauthorization is on the horizon, so it may be before your year is up.

Senator LEVIN. So we will have to mark our calendar to remember to ask you that question. But if you would, we would like you

to comment on that after some experience in office, to initiate a letter to us indicating changes that you might make relative to protection of the independence of the office.

Judge NEBEKER. I will do so, sir.

Senator LEVIN. Thank you. If you were to receive a call from someone at the White House, or anywhere else, directing you to back-off on an investigation, how would you respond?

Judge NEBEKER. Negatively, sir.

Senator LEVIN. Executive Order 11-222 has been described as some as the cornerstone of the standards of conduct for all Federal employees. One provision of the order is commonly referred to as the "appearance standard" and it basically says that an officer or employee should avoid the appearance of a conflict of interest.

Do you believe that the Executive Order, and particularly the appearance standard, is an enforceable standard? Or is that just something which is aspirational?

Judge NEBEKER. I do not believe it is precatory. It is very much like Canon 2 of the Code of Judicial Conduct which enjoins the appearance of impropriety. It is an enforceable canon on an objective, fully informed predicate. And I believe that the Executive Order is likewise subject to enforcement that way.

Senator LEVIN. One of the specific responsibilities, Judge, of the OGE Director is to order corrective action on the part of agencies and employees "which the Director deems necessary," in the words of the statute. The prior OGE Director did not believe that he should order such action, preferring instead to leave it up to each agency to decide what action is appropriate.

What is your view of this corrective action authority?

Judge NEBEKER. Well, there is a very delicate balance, as I read the statute. It is one that is so delicate—that is, between the authority of the agencies and the authority of the director—that, again, a coefficient of experience it seems to me is necessary for an intelligent reply to that. It is very, very delicately balanced.

Senator LEVIN. Are you in a position yet then to say when you believe the OGE Director should order corrective action on the part of an agency or employee?

Judge NEBEKER. No, I am not.

Senator LEVIN. I take it you are open on that issue?

Judge NEBEKER. Yes, sir.

Senator LEVIN. Let me ask you a slightly different question.

Judge, over the last 7 years during which this Committee has had oversight of the Office of Government Ethics, I have been repeatedly disappointed in OGE's ability to get important ethics matters and cases resolved expeditiously. I have seen significant delays in resolving the financial disclosure forms of top officials, even when allegations about those officials have been of significant public interest.

We recently reviewed OGE files for the financial disclosure reports of 10 high-ranking Government officials to see, among other things, how long it took the OGE to complete their reviews. Although the statute says that OGE should review the forms within 60 days, we found that the time limit was exceeded in 9 out of 10 cases; in 7 of the 10 cases OGE waited over 6 months before signing

off on the form; in two cases OGE never signed off on several years of those disclosure forms.

I have also seen what I think are unjustifiable delays in resolving cases where high Government officials have created, at a minimum, appearances of conflict of interest. In some cases almost a year may go by before the Executive Branch agency involved takes any action to discipline the subject employee.

I have real concerns about this problem, Judge, and I would like to ask you if you are willing to step on some toes, if necessary, to get pending ethics matters in cases resolved?

Judge NEBEKER. I am not as familiar as you are with the problem you have identified. My first thought would be perhaps it is overburdened staff, since I do not start with the presumption that there is evil afoot with human beings. I think basically they are honest individuals.

And the answer is, to the extent that it is logistically possible, I would see to it that the statute is complied with with respect to timely review of financial statements. My recollection is there is a 60-day limit on some financial reports and a statutory mandate is precisely that—a statutory mandate.

Senator LEVIN. My question is—and we appreciate that answer—my question is slightly different. My question is, would you be willing to, as I phrased it, step on toes if necessary to promptly resolve pending ethics matters in cases?

Judge NEBEKER. Surely.

Senator LEVIN. If that is what it takes.

Judge NEBEKER. If a financial report is tardy, then I take it you mean step on the individual's toes who has got to submit it. If we have it and it is a matter of review, then that is a staff problem as I would perceive it.

Senator LEVIN. So either way you would be willing to take appropriate action?

Judge NEBEKER. Yes. To that extent practicable, I would do so.

Senator LEVIN. To the extent that you have the resources?

Judge NEBEKER. Yes.

Senator LEVIN. We have also had some problems with the OGE on the question of the role of Congress in overseeing the ethics program and in particular the extent to which Congress can and should have access to documents and information on individual cases.

Do you have any opinion as to how you would treat Congressional requests for information on a pending ethics case?

Judge NEBEKER. The oversight role that Congress has is indeed a legitimate role. To the extent that the legislation permits disclosure of material that is not by statute held to be confidential, I see absolutely no impediment to it whatsoever. As was mentioned a moment ago by Senator Cohen, there is the amorphous "fairness notion" of not having reputations ruined through premature public disclosure. Consistent with his views, I would take every effort to ensure that that did not happen in the course of requests by the Congress for disclosure of information.

Senator LEVIN. When you say "to the extent that legislation permits disclosure," would you slightly amend that to say "to the extent that the law permits disclosure?"

Judge NEBEKER. Yes. Oh, yes. That is precisely what I mean.

Senator LEVIN. And if your efforts for corrective action or disciplinary action were being ignored in a particular instance, do you see any role for Congress in supporting your position or effort?

Judge NEBEKER. In contemplation of the law, probably not. As a practical matter I fully understand the suasion of the Congress.

Senator LEVIN. You understand it. Does that mean you might be open to seeking it, depending on the circumstances, presuming that the law permitted you to do so?

Judge NEBEKER. Presuming that the law permitted it, yes.

Senator LEVIN. And do you believe that Congress should be kept aware of the progress in individual cases of public concern, on a confidential basis at least?

Judge NEBEKER. I really do not have the experience on that one to give you a definitive answer. Anything I would by way of answer at this point would be strictly a guess.

Senator LEVIN. One of the director's responsibilities is to assist the Attorney General in evaluating the effectiveness of conflict-of-interest laws and recommending appropriate amendment. In the information that you provided us prior to this hearing, you noted that you are an officer of the National Commission of the Reform of Federal Criminal Law.

Judge NEBEKER. I was a consultant to that group.

Senator LEVIN. A consultant. Has the Commission taken a position on whether changes in Federal conflict-of-interest law is in order?

Judge NEBEKER. Mr. Chairman, I believe that Commission no longer exists.

Senator LEVIN. Do you know, when they did exist, if they took a position on that?

Judge NEBEKER. I do not recall. It was a long time ago. It was in the mid-1960's that the Commission existed, and, as a matter of fact, I think the Omnibus Crime Bill that was just passed was the culmination of the effort that that Commission began that long ago. So things take time I have observed, and I have forgotten, in the interim, exactly what it did.

Senator LEVIN. One of the matters which troubled some of us is that OGE does not collect or retain timely Government-wide statistics on the administration of ethics laws, even though OGE is required by the Ethics In Government Act to provide overall direction of Executive Branch policies relating to conflicts of interest.

For example, we have no way of readily knowing how many conflict-of-interest cases were investigated by agencies, how many were referred to the Justice Department for further investigation or prosecution, and how many were actually prosecuted. A fear is that the cases can get lost in the cracks. We do not know whether the laws are working.

Do you see this as a problem, and would you, as Director, plan to institute any type of management information system to permit OGE to collect these statistics?

Judge NEBEKER. From what you say, the problem exists. I suspect it is logistical. The office has many statutory duties, as we have observed, and I am sure that to the extent possible the office is trying to discharge all those duties. But I imagine some first things do

have to come first. My guess is, as I say, that if there are shortcomings in this area it is probably budgetary and logistical, but I do not.

Senator LEVIN. Would you let us know, after you are familiar with your duties, as to what your view is on that issue? If it is a purely logistical problem of not enough staff, would you let us know, and whether or not you think it is worth adding staff for that purpose?

If it is something other than that, would you let us know? If you are going to do it, let us know. In other words, six months, or whenever, after you are familiar with your job, would you get back to us on that issue?

Judge NEBEKER. Yes, sir.

Senator LEVIN. The OGE director is also required by the Ethics Act to cooperate with the Attorney General in developing an effective system for reporting allegations of violations of conflict-of-interest laws to the Attorney General. Currently, the Inspectors General refer cases to either the U.S. Attorneys or to the Public Integrity Section of the Criminal Division. Neither office will necessarily know of referrals to the other office, and OGE is not regularly informed of such referrals.

Do you believe that that is an effective system for reporting allegations, and would you, as OGE director, do anything to establish such a reporting system, or to bring OGE into the referral loop?

Judge NEBEKER. Well, Mr. Chairman, for a change I can say that I can speak from some experience.

I do know that in the criminal-investigation field, many allegations can be made. There is a secrecy requirement respecting Federal felonies because they go before, initially, before Federal grand juries.

So the idea of making public allegations of crime has friction with the obligation of grand-jury secrecy, and I would have to balance those two rules of law, or that rule of law with any demand for disclosure of allegations of criminal conduct.

And again, as Senator Cohen noticed, publicizing allegations, in and of itself, constitutes an indictment and a conviction in some communities, and therefore we must be very careful.

Senator LEVIN. I do not think we are talking here about disclosure of names, but just the fact of the matter being disclosed to OGE, which can retain it and use it for statistical purposes.

Judge NEBEKER. I am sorry. I did not catch the first part of your question.

Senator LEVIN. Let me read it again. You are required to cooperate with the Attorney General in developing a system for reporting allegations of violations to the Attorney General. Inspectors General refer cases either to U.S. Attorneys or to the Public Integrity Section of the Criminal Division, and neither office will necessarily know of referrals to the other office. The question is, should you be brought into the loop?

Judge NEBEKER. I do not really know the answer to that. To the extent that we have this problem of disclosing allegations of crime, I repeat: we have got a grand-jury secrecy requirement also.

Senator LEVIN. Senator Cohen.

Senator COHEN. Judge Nebeker, do you believe that the director of the OGE should have a publicly visible role? In other words, we talked about setting a tone. Any new Administration starts drawing people from the private sector and putting them into Government service, and most people come with very little sense about what is going to be required of them, in terms of conflicts of interest, for example.

Suddenly, they come to be held to a different standard. And I can think of a couple of major cases in which someone might be put in a position in which they are required to divest themselves of stock, and they say, "wait a minute, I am really going to get hit here with some substantial capital-gains taxes if I have to put my stock in a blind trust."

And so they come into public service and then find that perhaps they cannot afford to be in public service.

Do you think that there is a role for the director of OGE to set a public tone by being an advocate, in addition to being an enforcer, so that you advocate certain ethical standards? Or is it something that should be handled internally?

Judge NEBEKER. Well, an advocate has I think a slightly different meaning than a teacher. I think an educational role is a very vital role for this office.

Under Section 402, prevention, prevention is the major goal statutorily assigned to this office. The prevention of conflict of interest. To the extent that your question asks whether I should have a high profile, as a traffic police officer out to keep people slowed down, rather than hiding behind a road sign and catch those that go fast—I guess my answer is I am preventative, and so I would be out where I could be seen, in terms of don't do this, let's educate the people they can't do that, because that is the primary obligation of the office as I understand it from the statute.

Senator COHEN. Would that include issuing public statements concerning ethical standards, for example?

Judge NEBEKER. Well, I read in the paper——

Senator COHEN. In other words, to issue a sort of public advisory, that there is going to be a 55- or 65-mile-per hour rule around here, meaning in the Executive Branch, and, that these are some of the rules that you will have to follow?

Judge NEBEKER. Well, to the extent that we want public confidence in the Government, of course their knowledge that there is someone out there trying to prevent these problems I think is a salutary thing. Primarily, though, I suppose the answer is educate those who are coming into Government, or about to come into Government, so that they do not have these problems, and if the problems do not surface, public integrity, the belief in public integrity will remain intact.

It is the examples of violations that harm public integrity, and as I view our role, it is to prevent those examples from ever occurring in the first place.

Senator COHEN. Well, as Senator Levin indicated in the opening remarks, it is a five-year term. Do you intend to stay the full five years at this point? Even if the unfortunate thing should take place that you have a Democratic Administration in 1988?

Judge NEBEKER. Assuming the creek does not rise, I have no present plans to leave at an earlier time.

Senator COHEN. And with no difficulty passing judgment upon a Democratic Administration as well as a Republican one? That does not affect your judgment, one way or the other?

Judge NEBEKER. I do not think so, sir. I have lived by an oath for the last 15 years to administer justice fairly, and I think I know how to live by that concept.

Senator COHEN. I believe that is correct, too, Judge. Thank you very much.

Judge NEBEKER. Thank you, Senator.

Senator LEVIN. The standard question that we ask all nominees is do you agree, without reservation, to respond to any reasonable request, or summons to appear and testify before any duly constituted Committee of the Congress?

Judge NEBEKER. I do, sir.

Senator LEVIN. We added the word "reasonable" before request.

Senator COHEN. What is that?

Senator LEVIN. We say any "reasonable" request. I did not know we were so judicious. Maybe it is because you are a judge that we added that.

Judge NEBEKER. I heard the word loud and clear.

Senator LEVIN. I am sure you did.

Senator COHEN. Strike the word "reasonable."

Judge NEBEKER. Please don't.

Senator LEVIN. And I would not phrase it that way. I would say "any appropriate request." But at any rate, your answer will stand for the record.

Senator Roth and Senator Heinz will also have statements for the record which we will insert.

[The statements referred to follow:]

OPENING STATEMENT OF SENATOR ROTH

The confirmation hearing today for the Director of the Office of Government Ethics is welcome. This is a very important position as the Director is called on to provide consistent guidance on conflict of interest issues within the executive branch. Judge Nebeker has the qualifications that should enable him to restore some of the lost confidence in the effectiveness of that office.

Over the years there has been an increased awareness on the part of the public regarding ethical issues raised involving government officials at all levels. Since the Office of Government Ethics serves as the central coordinating office and provides overall direction of executive branch policies related to preventing conflicts of interest, it is imperative that the public and Congress have confidence in the individual that serves as the Director of that Office.

Judge Nebeker, with his strong legal background and judicial experience, should be allowed to move into the position as Director without prejudice for actions taken by the former Director. While there has been recent controversy over actions—or inactions as the case may be—of that Office, I think the Committee should review what legislative remedies might be necessary to provide stronger enforcement power—if, indeed, that seems desirable.

This Committee will consider reauthorization of the Office of Government Ethics next year. Perhaps we can persuade Judge Nebeker, once he has had the opportunity to serve as Director in implementing the current statute, to share his insight with us as we consider any amendments to the law.

I would close by expressing my support for Judge Nebeker's nomination. We will look forward to working with him in the future.

OPENING STATEMENT OF SENATOR HEINZ

Mr. Chairman, thank you for this opportunity to review a nomination for what some might call one of the most sensitive positions in the Nation's Capital.

Since 1978, the Office of Government Ethics has helped to direct executive branch policies related to preventing conflicts of interest on the part of Federal employees. This work is essential not only to the smooth and effective functioning of Government but also to the people's faith in their elected representatives and in Government in general.

Controversy is not a stranger to this office and any nominee will have to make many difficult choices and decisions upon assuming the directorship. It is a position requiring one of great character and moral conviction. With a term spanning 5 years, the responsibilities of the next director will include overseeing at least one Presidential transition.

Because the Office of Government Ethics is up for reauthorization in October of next year, and because we are, as I mentioned, facing a significant Presidential transition, it is important that a nomination proceed as expeditiously as possible. I would add that this nomination is extremely timely. The independent counsel reauthorization is on the calendar, and the Governmental Affairs Committee has ongoing investigations into questions of Government ethics.

I look forward to reviewing Judge Nebeker's testimony. Thank you, Mr. Chairman.

Senator LEVIN. We will also insert in the record an opinion from the Congressional Research Service, the preliminary draft of which we have received, relative to whether there is a constitutional or statutory prohibition against a District of Columbia senior judge serving as a Presidential appointee in the Executive Branch.

It will give you and us both some comfort, to the extent that any of us need such comfort. We will put that in the record.[1]

Judge NEBEKER. I think that is a very fine thing, and I am grateful for it, because one of the problems that I saw is, if I have worked for, "the United States," in the sense of its Executive Branch, could I come back into court and sit on cases prosecuted in the name of the United States.

I had not looked into it, but I recognize it as something that needed to be explored.

Senator LEVIN. Well, I hope that that part is covered. I am not sure it is, but in any event, we will share this with you. We will make it a part of the record.

The preliminary draft says there is no conflict in your serving in this position. I am not sure it goes back into the situation when you rejoin the judiciary, if you do, as a judge, and whether there is a problem then. I hope it gives you protection in that regard, but I cannot represent to you that it does.

That is all the questions that I have. We look forward to your service. I know that Senator Cohen has been a leader for so long in the struggle to improve the quality of service and the appearance and fact of ethical conduct on the part of all of us in the Federal Service, and I have worked closely with this office and its directors.

We look forward to working closely with you. There will be some additional questions of you for the record which either of us might ask, and I know some of our colleagues will be asking. That will not slow up your confirmation process. We are, hopefully, going to act very expeditiously on this to set a high standard for the expeditious handling of matters by the OGE office under your tenure.

Thank you, Senator Cohen.

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[1] See p. 23.

Senator COHEN. Thank you, Mr. Chairman.

Senator LEVIN. Judge, congratulations to you, and your family, and your friends and supporters, the cheering section out there. We are glad to have had you with us this morning.

Judge NEBEKER. You have been most gracious.

Senator LEVIN. Thank you.

[Whereupon, at 10:25 a.m., the Committee was adjourned, subject to the call of the Chair.]

APPENDIX

BIOGRAPHICAL AND FINANCIAL INFORMATION REQUESTED OF NOMINEES
A. Biographical Information

1. Name: Frank Q. Nebeker

2. Position to which nominated: Director, Office of Government Ethics

3. Date of nomination: September 15, 1987

4. Address: (Home) 2360 N. Vermont Street
Arlington, VA 22207

(Office) District of Columbia Court of Appeals
500 Indiana Avenue, N.W.
Washington, D.C. 20001

5. Date and place of birth: April 23, 1930, Salt Lake City, UT

6. Marital Status: Louana Visintainer Nebeker

7. Names and ages of children: Caramaria C. Nebeker, age 33
Melia Lynn Monch, age 29
W. Mark Nebeker, age 28

8. Education: List secondary and higher education institutions, dates attended, degree received and date degree granted.

Central Jr. High School	1942 - 1945	
Ogden High School	1945 - 1948	
Weber Jr. College	1948 - 1950	A.A.
University of UT	1950 - 1953	B.S.
G.W. University Law School	1953 - 1954	
Washington School of Law, American University	1954 - 1956	J.D.

9. Employment record: List all jobs held since college, including the title or description of job, name of employer, location of work, and dates of employment.

The White House, 9/8/53 - 8/11/56 - Mail, file, and record clerk and correspondence secretary.
Dept. of Justice, Internal Security Division, Washington, D.C. - 8/13/56 - 10/5/58, Trial Attorney.
Dept. of Justice, Washington, D.C. - 10/6/58 - 5/16/69, Assistant United States Attorney, District of Columbia.
District of Columbia Court of Appeals - 5/13/69 - 10/1/87 Associate Judge.

10. Government experience: List any advisory, consultative, honorary or other part-time service or position with Federal, State, or local governments, other than those listed above.

None.

11. Business relationships: List all positions held as an officer, director, trustee, partner, proprietor, agent, representative, or consultant of any corporation, company, firm, partnership, or other business enterprise, educational or other institution.

National Commission on Reform of Criminal Law.

12: Memberships: List all memberships and offices held in professional, fraternal, scholarly, civic, business, charitable and other organizations.

Chairman, Appellate Judges Conference (professional)
American Law Institute (professional)
Lawyers Club (social)
Cosmos Club (social)

John Carroll Society (religious)
WAVIMAR Fishing Club (boating)
Palaver Club (scholarly)

13: Political affiliations and activities:

(a) List all offices with a political party which you have held or any public office for which you have been a candidate.

None.

(b) List all memberships and offices held in and services rendered to all political parties or election committees during the last 10 years.

None.

(c) Itemize all political contributions to any individual, campaign organization, political party, political action committee, or similar entity of $50 or more for the past 10 years.

None.

14. Honors and awards: List all scholarships, fellowships, honorary degrees, honorary society memberships, military medals and any other special recognitions for outstanding service or achievements.

University of Utah Outstanding Alumnus Award.

15. Published writings: List the titles, publishers, and dates of books, articles, reports, or other published materials which you have written.

Judicial opinions beginning in 256 Atlantic Reporter 2d to present.
Hints for the Court-Appointed Lawyer in Appellate Cases, D.C. Bar Journal, September - October 1967.
The Judge Needs a Lawyer, Catholic University Law Review, Vol. 29, No. 4, 1980.
Plans, Programs, and Persuasions, The Judges' Journal, American Bar Association, Vol. 19, No. 4, Fall 1980.
About a Friend, The Judges' Journal, American Bar Association, Vol. 20, No. 2, Spring 1981.
Court Management Symposium, The Judges' Journal, American Bar Association, Vol. 20, No. 3, Summer 1981.
An International Education, The Judges' Journal, American Bar Association, Vol. 20, No. 1, Winter 1981.

16. Speeches: Provide the Committee with two copies of any formal speeches you have delivered during the last 5 years which you have copies of and are on topics relevant to the position for which you have been nominated.

None.

17. Selection:
(a) Do you know why you were chosen for this nomination by the President?

Yes.

(b) What do you believe in your background or employment experience affirmatively qualifies you for this particular appointment?

Thirty-two years of professional and judicial activity with ever present ethical demands.

B. Future Employment Relationships

1. Will you sever all connections with your present employers, business firms, business associations or business organizations if you are confirmed by the Senate?

No. I will continue my status as a Senior Judge but will not perform judicial duties until I leave this position.

2. Do you have any plans, commitments or agreements to pursue outside employment, with or without compensation, during your service with the government? If so, explain.

Yes. I will continue with the Appellate Judges' Conference educational activities without compensation consistent with my other duties.

3. Do you have any plans, commitments or agreements after completing government service to resume employment, affiliation or practice with your previous employer, business firm, association or organization?

Yes. I will resume judicial duties.

4. Has anybody made a commitment to employ your services in any capacity after you leave government service?

No.

5. If confirmed, do you expect to serve out your full term or until the next Presidential election, whichever is applicable?

Yes.

C. Potential Conflicts of Interest

1. Describe all financial arrangements, deferred compensation agreements, and other continuing dealings with business associates, clients or customers.

None.

2. Indicate any investments, obligations, liabilities, or other relationships which could involve potential conflicts of interest in the position to which you have been nominated.

None.

3. Describe any business relationship, dealing or financial transaction which you have had during the last 10 years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated.

None.

4. Describe any activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat or modification of any legislation or affecting the administration and execution of law or public policy.

Helped draft and supported American Bar Association Resolution to amend 18 U.S.C. §§ 1983 and 1988 respecting judicial immunity.

5. Explain how you will resolve any potential conflict of interest, including any that may be disclosed by your responses to the above items. (Please provide a copy of any trust or other agreements.)

N/A

6. Do you agree to have written opinions provided to the Committee by the designated agency ethics officer of the agency to which you are nominated and by the Office of Government Ethics concerning potential conflicts of interest or any legal impedim nts to your serving in this position?

Yes.

D. Legal Matters

1. Have you ever been disciplined or cited for a breach of ethics for unprofessional conduct by, or been the subject of a complaint to any court, administrative agency, professional association, disciplinary committee, or other professional group? If so, provide details.

I have never been disciplined or cited. If the subject of a complaint, I have not been informed of it. You may contact the District of Columbia Commission on Judicial Disabilities and Tenure, Building A, Room 312, 515 5th Street, N.W., Washington, D.C. 20001.

2. Have you ever been investigated, arrested, charged or held by any Federal, State, or other law enforcement authority for violation of any Federal, State, county or municipal law, regulation or ordinance, other than a minor traffic offense? If so, provide details.

No.

3. Have you or any business of which are are or were an officer ever been involved as a party in interest in any administrative agency proceeding or civil litigation? If so, provide details.

As an Assistant United States Attorney, I was sued many times by prisoners and disgruntled people between 1960 and 1969. I have no record of those suits. None were disposed of unfavorable to me or the United States.

Also see District of Columbia Court of Appeals Committee on Admissions, et al. v. Feldman, et al., No. 81-1335 (U.S. Sup. Ct.). This case was concluded by the decision of the U.S. Supreme Court reported at 460 U.S. 462 (1983).

McGean v. Mohler, et al, No. HM-82-1592 (U.S. Dist. Ct. Md.). This case was dismissed by order filed January 8, 1985.

4. Have you ever been convicted (including pleas of guilty or nolo contendere) of any criminal violation other than a minor traffic office?

No.

5. Please advise the Committee of any additional information, favorable or unfavorable, which you feel should be considered in connection with your nomination.

I can think of none.

E. Financial Data

(Retained in Committee files.)

AFFIDAVIT

Frank Q. Nebeker being duly sworn, hereby states that he has read and signed the foregoing Statement on Biographical and Financial Information and that the information provided therein is, to the best of his knowledge, current, accurate, and complete.

Frank Q. Nebeker

Subscribed and sworn before me this 1st day of October, 1987.

Deborah Miller Wagner
Chief Deputy Clerk

RESPONSES OF JUDGE NEBEKER TO POSTHEARING QUESTIONS

Question 1. Is there any responsibility of the Director of the Office of Government Ethics, as set forth in section 402 of the Ethics in Government Act of 1978, on which you would place special emphasis during your tenure as Director?

Answer. I would place special emphasis on prevention of conflicts of interest by entry and in-service educational programs and adoption of rules of conduct for those seeking, or being sought for, and those in post-service private employment.

Question 2. The Director of the Office of Government Ethics is provided a wide range of authority by which to oversee the Federal ethics system. In some ways, the scope of that authority is dependent upon the way in which it is viewed by the Director. If the Director wants to become actively involved in the management of the Federal ethics system, the statute provides the authority to do so.

What do you see as the role of the Office of Government Ethics and the Director of that Office in the Federal Government's overall ethics program?

What do you see as the proper relationship between the Office of Government Ethics and the designated agency ethics officials? What about OGE and the Department of Justice?

What is your responsibility to Federal employees seeking ethics advice?

Answer. The declarative statements preceding the three questions in this part may be subject to dispute and I do not wish at this time to be taken as necessarily in agreement with them.

The role of the Office and the Director is to provide overall direction of executive branch policies after consultation with responsible officials of OPM to the end that conflicts of interest by officers and employees in that branch are prevented. The remainder of section 402 of the Act delineates specific included responsibilities which are in aid of the preventative policy expressed in the Act. To further that policy, a review of financial reports, as provided, is required by section 206 so that appropriate action can be taken if required. The review procedures of financial statements provided in section 206 is a most important function aimed at enforcement and thus prevention of conflicts on interest. In addition, a most significant role is to provide by educational, regulatory and opinion process a means of realizing the purposes of the act.

The relationship between the Office and the designated agency ethics officials is, according to the Act, a mixture of coordination in implementing the Act, consultation with agency ethics officials on request to the same end, and the efficient and appropriate use of such officials as augmentation to the staff of the Office so that its effectiveness and oversight can be expanded directly into each agency.

The relationship with the Department of Justice, in addition to the answer immediately above, includes a closer connection to overall policy to be expressed by rules and regulations and changes thereto when needed, as well as assisting the Attorney General in evaluating the effectiveness of relevant laws. Additionally, there is the need to assist in reporting to the Department of Justice allegations of violations of laws carrying punitive sanctions.

A Federal employee seeking ethical advice is entitled to a prompt advisory opinion as provided in section 402(b)(8). If the request for advice is not covered by this subsection, the advice and ordered corrective action, if any, need not be in compliance with that subsection, but should be furnished consistent with the purpose of the act.

Question 3. What would you do, as OGE Director, if rumors or allegations of ethical misconduct surface in the press about a top executive branch official? Under what circumstances would you issue or not issue a public statement? What function do you believe such statements perform?

Answer. To the extent that press reports of rumors or allegations of ethical misconduct might be about violations of criminal laws, and those in the Department of Justice charged with investigation of such matters are presumed to be aware of those reports, referral by me under section 402(b)(13) would probably be redundant. If the press report was not about possible criminal conduct, I would be available to consult with the concerned agency ethics counselors or other responsible officials when asked. Depending on the specific nature of the surfaced press disclosure, I would determine if investigation by my office was warranted, e.g., a review of financial statements on file with the office. Also, if appropriate, I would seek a report from the agency involved.

Since issuance of public statements is not specifically authorized by the act, I am presently inclined to be chary about issuing any. I am not prepared exhaustively to anticipate the myriad factual situations which might be presented calling for an evaluation of whether my basic inclination would be subject to an exception.

Public statements by the Director about press reports of rumors or allegations of ethical misconduct can hamper legitimate law enforcement efforts, contribute to fair trial problems of anyone later criminally charged and often further damage the reputation of someone innocent of the alleged or rumored misconduct.

Question 4. The Committee is considering a series of proposals related to presidential transitions. One of these relates to the provision of public funds for pre-election transition planning—including the development of a personnel process for use in the transition. OGE already assists in the presidential appointee process during presidential transitions. Do you think such support should or could also be provided during the pre-election planning stage?

Answer. Yes, to the extent practicable.

Question 5. During presidential transitions, many people gain access to Departments and Agencies to examine the organizations' structures and develop policy options for the president-elect. This sometimes creates at least the appearance of a conflict of interest. For example, a representative of the clothing industry serving on a transition team may have access to Department of Commerce information about the appropriate level of clothing imports. We have been encouraged to strengthen ethics coverage of presidential transition members—at least requiring them to disclose their names and affiliations. Do you think this would be a reasonable step? If required, who should such information be disclosed to—OGE, agency ethics officers, GSA, or someone else?

Answer. Yes. Since there are so many people participating in the transition in all the agencies and the time of their activities is limited to the time between the election and inauguration, the more decentralized such evaluation function can be the more effective it is apt to be. Use of agency ethics officers is probably the best way to accomplish this goal.

Congressional Research Service
The Library of Congress

Washington, D.C. 20540

October 28, 1987

TO: Senate Governmental Affairs Committee
Subcommittee on Oversight of Government Management
Attn: Curtis Copeland

FROM: American Law Division

SUBJECT: Constitutional Ramifications of the Appointment of a Judge Accorded Senior Status on the District of Columbia Court of Appeals to a Position in the Executive Branch

This memorandum is in response to your request to determine whether there is a constitutional prohibition against the appointment of a judge who has applied for senior status at the District of Columbia Court of Appeals to be Director of the Office of Government Ethics. You indicated that during the judge's proposed tenure as Director, he would not hear cases at the Court of Appeals, but would merely retain the ability to return to the bench after the expiration of his appointment.

There appears to be no explicit constitutional prohibition which would prevent a senior judge of the District of Columbia Court of Appeals from working in the Executive Branch. There also appears to be no explicit prohibition in the statutes creating these two positions which would prevent such an appointment. Further, the jurisdiction of the District of Columbia Court of Appeals is generally limited to local matters, which diminishes the likelihood that a situation would develop where the judge would have to consider recusal to prevent a conflict of interest. Finally, absent the existence of a conflict of interest, the commonlaw doctrine of incompatibility of offices would not appear to act as a bar to this appointment.

Art. I, Section 8, cl. 17 of the Constitution provides that the Congress shall have the power to exercise exclusive legislation in the District of Columbia. This includes the power to exercise all police and regulatory powers which a state government would have in legislating for state purposes.[1] In 1970, the Congress enacted the District of Columbia Court Reform and Criminal Procedure Act,[2] which established the Superior Court of the District of Columbia, and the District of Columbia Court of Appeals (hereinafter D.C. Courts). This Act provides that a judge, retired for reasons other than disability, may perform, upon designation by the chief judge, those judicial duties he or she is willing to undertake.[3]

The Office of Government Ethics, which is a part of the Office of Personnel Management, was established by the Ethics in Government Act of 1978, 5 U.S.C. App. Sections 401-405 (1982), to coordinate the creation of policies regarding conflicts of interest in the Executive Branch. The Act, which provides for a Director of the Office of Government Ethics, does not appear to contain any prohibition against the Director holding a position in another government entity.

The U.S. Constitution contains a number of prohibitions against the

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1 See Palmore v. United States, 411 U.S. 389 (1973).

2 84 Stat. 473, Pub. L. 91-358 (1970)

3 11 D.C. Code Ann. Section 1504 (1981)

appointment of individuals of one branch or position to another branch or position.[4] No general provision dictates, however, that a person holding a position in one branch of the federal government is prohibited from also holding a position in another branch, and in practice, there are examples of persons holding positions in both branches.[5] The Constitution even provides that the Vice-President, an officer of the Executive Branch, is also the President of the Senate, and may vote when the vote in the Senate is equally divided.[6]

It may also be relevant that the D.C. Court system is not a part of the federal judiciary established under Article III. The Congress is given the power under Article I to create tribunals inferior to the Supreme Court.[7] Under Article III, however, the judicial power of the

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4 See U.S. Const. Art. I, Sec. 6, cl. 2 (No Senator or Representative shall, during the time for which he is elected, be appointed to any civil office under the authority of the United States, which shall have been created or the emoluments increased during such time; and no person holding an office under the United States, shall be a member of either house during his continuance in office); U.S. Const. Art. I, Sec. 9, cl. 8 (No person holding any office of profit or trust shall, without the consent of Congress, accept any present, emolument, office, or title from any King, Prince, or foreign state); U.S. Const. Article II, Sec. 1, cl. 2 (No Senator or Representative, or person holding an office of profit or trust under the United States, shall be appointed as an elector [of the electoral college]).

5 A number of members of the legislative branch, for example, are also members of the Armed Services Reserves, a unit of the Executive Branch. See e.g. Congressional Directory 1987-88, 100th Congress 5 (G.P.O. 1987).

6 U.S. Const. Art. 1, Sec. 3, cl. 4.

7 U.S. Const. Art. 1, Sec. 8, cl. 9.

United States is vested in the Supreme Court and in such inferior courts as Congress may establish. In the case of Palmore v. United States, 411 U.S. 389 (1973), a convicted individual disputed the ability of a District of Columbia Superior Court judge to preside over his trial, as the judge did not appear to have the attributes required of a federal judge under Article III of the Constitution.[8] In Palmore, the Supreme Court held that the District of Columbia court system, while created by Congress under Article I, was not established as an Article III court. Subsequent legislation has made this distinction statutorily.[9]

The status of the District of Columbia local court system as an Article I court, and the local nature of its jurisdiction, weighs against an argument that this executive appointment may violate the concept of separation of powers. Generally, a separation of powers problem is due to the attempt of one constitutional branch of government to exercise powers assigned to another established branch.[10] While an individual working in two positions in different branches might exercise his power in such a way as to favor one branch over another, the D.C. Courts are not clearly in any one of the branches of the federal-government. Consequently, the danger of conflict between branches is diminished.

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8 Article III judge hold their offices during good behavior, U.S. Const. Article III, Sec. 1, while District of Columbia Superior Court judges hold their office for 15 year terms, 11 D.C. Code Ann. Sec. 1502 (1981).

9 11 D.C. Code Ann. Sec. 101 (1981).

10 See Tribe, American Constitutional Law 15-16 (1978).

It is unclear if there are any circumstances under which the judge's position in the Office of Government Ethics would bring him into an issue area which could then be litigated before him in the District of Columbia Court of Appeals. If such a case did occur, the judge would potentially have a conflict of interest, and would have to consider recusing himself from the case.

At common law, concern over conflicts of interest arising when an individual held two government positions led to the doctrine of incompatibility of offices.[11] This doctrine, which was developed primarily at the state level, precludes individuals from holding two positions in which the duties could give rise to possible conflicts of governmental interest, or where the nature of the two offices is such as to render it improper for considerations of public policy for one person to hold both.[12] Where the offices operate in two different spheres, so that one is not subordinate to the other's supervision or control, no common law incompatability exists.[13] In the federal sector, the Supreme Court has held that a person may hold two offices, provided they are distinct, and are not incompatible.[14]

The holding of incompatible offices by an individual in a position of adjudicator has been held to deny due process to the party appearing

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11 63A Am. Jur. 2d Section 717 (1984).

12 Crain v. Gibson, 250 N.W.2d 792 (1977).

13 Clark v. DeFino, 80 N.J. 539, 404 A.2d 621 (1979).

14 United States v. Saunders, 120 U.S. 126 (1887).

15 409 U.S. 57 (1972).

before that individual. In Ward v. Monroeville,[17] it was held to be a violation of due process for a mayor to have responsibility for both law enforcement and revenue production. The fines levied by the mayor were deemed incompatible with the mayor's interest in raising revenue for the city. A finding of a due process violation requires, however, a finding that actual incompatibility exists.[17] Even an individual in two interrelated government positions may not be presented with conflicting interests, and his decisions would thus not run afoul of due process considerations.[18]

It should also be noted that under 5 U.S.C. Section 5533 (1981), an individual employed by the Federal Government District of Columbia is not entitled to receive basic pay from more than one position for an aggregate of more than forty hours of work in one calender week. If, however, earlier, the judge is not assigned any cases while he is Director of the Office of Government Ethics, and if he receives no compensation from the D.C. Courts apart from retirement pay, then neither the incompatibility of offices doctrine nor Section 5533 would appear to be violated.[19]

Kenneth R. Thomas
Legislative Attorney

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16 409 U.S. 57 (1972).

17 See e.g. Citizens Ass'n v. District of Columbia Alc. Bev. Bd., 359 A.2d 295 (1976)(holding that the positions of Department of Economic Development and chairman of the Alcoholic Control Board were not incompatible per se).

18 Id.

19 This memorandum addresses the issues of constitutionality, statutory authority, and commonlaw auhority for the holding of two government position. This memorandum does not address the issue of how judicial canons or the D.C. Court's internal procedures regarding senior judges would be affected.